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STATE INCOME TAXES AND THE COMMERCE CLAUSE

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Law, like politics, makes strange bedfellows. Among the queerest of such companions are the doctrine that the states cannot tax interstate commerce and the fact that they can. As might be anticipated, the doctrine and the fact do not dwell together in perfect amity. The efforts of the Supreme Court to mediate between them have as a rule failed to give full satisfaction to either. The most valiant effort at reconciliation is that of Mr. Justice Holmes in *Galveston, H. & S. A. Ry. v. Texas*,¹ but this frankly recognizes that an absolute logical reconciliation is impossible and invites us to look rather to practical distinctions.² The truth is that there is a wrong way and a right way for the states to tax interstate commerce. When the wrong way is adopted, the doctrine maintains its supremacy. When the right way is chosen, the fact prevails. The doctrine then saves its face by the nominalistic legerdemain of asserting that what is being taxed is not interstate

¹ (1908) 210 U. S. 217, 28 Sup. Ct. 638.

² "It being once admitted, as of course it must be, that not every law that affects commerce among the States is a regulation of it in a constitutional sense, nice distinctions are to be expected. Regulation and commerce among the States both are practical rather than technical conceptions, and, naturally, their limits must be fixed by practical lines. . . ."

"It appears sufficiently, perhaps from what has been said, that we are to look for a practical rather than a logical or philosophical distinction. The State must be allowed to tax the property, and to tax it at its actual value as a going concern. On the other hand the State cannot tax the interstate business. The two necessities hardly admit of an absolute logical reconciliation. Yet the distinction is not without sense. When a legislature is trying simply to value property, it is less likely to attempt or to effect injurious regulation than when it is aiming directly at receipts from interstate commerce. A practical line can be drawn by taking the whole scheme of taxation into account. That must be done by this court as best it can. Neither the state courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect. If it bears upon commerce among the States so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form." *Ibid.* at pp. 225, 227, 28 Sup. Ct. at pp. 639, 640.

commerce but something else. This something else is usually called property. When it is manifest that the values involved are a capitalization of earning power, we are told that the property in question is partly intangible.³ When taxes on gross receipts are permitted as substitutes for taxes on property, we learn that the tax is really a property tax.⁴ When net income from interstate commerce is held subject to taxation, we are assured that such a tax is but a method of distributing the cost of government, like a tax upon property.⁵ Thus by renaming, the cabbage becomes a rose, and the doctrine that the states cannot tax interstate commerce still struts as a universal though palpably it is something less.

This disposition of the Supreme Court to call proper taxes property taxes or to liken them to property taxes invites us to inquire as to the distinguishing characteristic of property taxes which makes them immune from criticism under the commerce clause. At the outset it may be observed that if the states really were precluded from taxing interstate commerce in any form, interstate business would enjoy a discriminatory dispensation that might often make it exceedingly difficult for local business to compete with it. The states must tax something, and if they could not in some way partake of the fruits of interstate commerce, they would have to take larger bites from the fruits of local commerce. So long as interstate commerce is not discriminated against, it ought to pay for the protection it receives as local commerce has to pay. For a long time the main source of state revenue has been taxes on property. A striking characteristic of property taxes is the generality of their grasp. Only in the exceptional instance does real estate escape from the clutch of Matthew. Until the advent of net-income taxes, most credits were liable to be taxed to the creditor.⁶ In

³ See *State Railroad Tax Cases* (1875) 92 U. S. 575; *Adams Express Co. v. Ohio State Auditor* (1896) 166 U. S. 185, 17 Sup. Ct. 604; *Adams Express Co. v. Kentucky* (1896) 166 U. S. 171, 17 Sup. Ct. 527; *Henderson Bridge Co. v. Kentucky* (1896) 166 U. S. 150, 17 Sup. Ct. 532; *Keokuk & Hamilton Bridge Co. v. Illinois* (1900) 175 U. S. 626, 20 Sup. Ct. 205; *Western Union Tel. Co. v. Missouri* (1903) 190 U. S. 412, 23 Sup. Ct. 730; *Louisville & Nashville Ry. v. Greene* (1917) 244 U. S. 522, 37 Sup. Ct. 683; *Illinois Cent. Ry. v. Greene* (1917) 244 U. S. 555, 37 Sup. Ct. 697; *Wells, Fargo & Co. v. Nevada* (1918) 248 U. S. 165, 39 Sup. Ct. 62; *Cream of Wheat Co. v. County of Grand Forks* (1920) 253 U. S. 325, 40 Sup. Ct. 558; *St. Louis & E. St. L. Elec. Ry. v. Missouri* (1921) 256 U. S. 314, 41 Sup. Ct. 488; *St. Louis-San Francisco Ry. v. Middlekamp* (1921) 256 U. S. 226, 41 Sup. Ct. 489.

⁴ *Maine v. Grand Trunk Ry.* (1891) 142 U. S. 217, 12 Sup. Ct. 121, as reincarnated in *Galveston, H. & S. A. Ry. v. Texas*, *supra* note 1; *Wisconsin & M. Ry. v. Powers* (1903) 191 U. S. 379, 24 Sup. Ct. 107; *United States Express Co. v. Minnesota* (1912) 223 U. S. 335, 32 Sup. Ct. 211; *Cudahy Packing Co. v. Minnesota* (1918) 246 U. S. 450, 38 Sup. Ct. 373; *N. W. Life Ins. Co. v. Wisconsin* (1918) 247 U. S. 132, 38 Sup. Ct. 444.

⁵ Mr. Justice Pitney in *United States Glue Co. v. Oak Creek* (1918) 247 U. S. 321, 329, 38 Sup. Ct. 499, 501.

⁶ See *Kirtland v. Hotchkiss* (1879) 100 U. S. 491; *Fidelity & C. Trust Co. v. Louisville* (1917) 245 U. S. 54, 38 Sup. Ct. 40. See also for taxation of other

various ways credits are often reached elsewhere as well.⁷ Corporate stock is taxable and often is taxed even though all that gives it value has already been taxed to the corporation.⁸ Wherever any legal *res* which may go by the name of property is exempted from taxation, it will usually be found that the economic interest which that *res* represents has contributed to the public fisc.⁹ So if the fruits of interstate commerce are reached only by a property tax, there is little danger that interstate commerce will pay more than enterprise generally must pay. When, therefore, interstate commerce is subjected to a property tax, it has adequate safeguards against unfavorable discrimination.

Contrasted with property taxes are special excises of one kind and another. States may impose license taxes on drummers or peddlers but not on merchants, on selling oil or sewing machines but not on vending generally. They may put exactions on railroads or telegraphs but not on draymen or reporters, on doing business as a corporation but not on enterprising individuals and partnerships. When a statute picks a special subject for a special tax, the object of its desire is practically certain to be forced into a generosity in excess of that indulged in by property and business generally. If this special subject is interstate commerce or includes interstate commerce, enterprise which straddles a state line is paying more than some or all of the enterprise that is of interest only to the taxing state. The danger that the taxing state will heed the monition that charity beginneth at home is sufficient to justify the court in looking askance at any exaction on interstate commerce that is not certain to be matched by equivalent exactions on all local

intangibles to their owner at his domicil, *Maguire v. Trefry* (1920) 253 U. S. 12, 40 Sup. Ct. 417; *Cream of Wheat Co. v. County of Grand Forks*, *supra* note 3; *Anderson v. Durr* (1921) 257 U. S. —, 42 Sup. Ct. 15.

⁷ See *Savings & Loan Society v. Multnomah County* (1898) 169 U. S. 421, 18 Sup. Ct. 392; *New Orleans v. Stempel* (1899) 175 U. S. 309, 20 Sup. Ct. 110; *Bristol v. Washington County* (1900) 177 U. S. 133, 20 Sup. Ct. 585; *State Board of Assessors v. Comptoir National D'Escompte* (1903) 191 U. S. 388, 24 Sup. Ct. 109; *Metrop. Life Ins. Co. v. New Orleans* (1907) 205 U. S. 395, 27 Sup. Ct. 499; *Liverpool, etc. Ins. Co. v. Board of Assessors* (1911) 221 U. S. 346, 31 Sup. Ct. 550; *Orient Insurance Co. v. Board of Assessors* (1911) 221 U. S. 358, 31 Sup. Ct. 554. For taxation of membership in produce exchange at place where exchange is located, see *Rogers v. Hennepin County* (1916) 240 U. S. 184, 36 Sup. Ct. 265.

⁸ For taxation at domicil of owner, see *Sturges v. Carter* (1885) 114 U. S. 511, 5 Sup. Ct. 1014; *Kidd v. Alabama* (1903) 188 U. S. 730, 23 Sup. Ct. 401; *Wright v. Louisville & N. Ry.* (1904) 195 U. S. 219, 25 Sup. Ct. 16; *Darnell v. Indiana* (1912) 226 U. S. 390, 33 Sup. Ct. 120; *Hawley v. Malden* (1914) 232 U. S. 1, 34 Sup. Ct. 201; *Ft. Smith Lumber Co. v. Arkansas* (1920) 251 U. S. 532, 40 Sup. Ct. 304. For taxation at domicil of corporation, see *Tappan v. Merchants' National Bank* (1873, U. S.) 19 Wall. 490; *Travellers' Ins. Co. v. Connecticut* (1902) 185 U. S. 364, 22 Sup. Ct. 673; *Corry v. Baltimore* (1905) 196 U. S. 466, 25 Sup. Ct. 297.

⁹ For illustrations see, *Indirect Encroachment on Federal Authority by the Taxing Powers of the States* (1918) 31 HARV. L. REV. 321, 366.

commerce. Any hardship on the states by reason of a ban on special exactions on interstate commerce is mitigated by the sanction accorded to taxes that take toll from interstate commerce by assessing the property used in such commerce at a valuation which includes the contribution of that use.¹⁰ If the states have one way of taxing interstate commerce, they can hardly be heard to complain that they do not have two ways or more—especially when these extra ways are special ways not applied to business generally. There are evils in cumulative taxes which are not present in a single demand.

This is the setting in which we must judge the cases in which taxation of interstate commerce is allowed. The two kinds of taxes with which this study is concerned are taxes on gross receipts and taxes on net income. It may be questioned whether taxes on gross receipts are properly included under the caption of state income taxes. In interpreting the federal Corporation Excise Tax of 1909, Mr. Justice Pitney laid down that not all gross receipts from the sale of property may be regarded as "gross income." Gross income, he says, does not arise until after the deduction of the cost of acquiring the property sold.¹¹ Nevertheless, the Supreme Court has allowed Congress free rein in determining what allowance for depletion is to be made in assessing income from mining operations under the Income Tax Act of 1913,¹² and has thereby made it possible to infer that some kinds of gross receipts satisfy the conception of income in the Sixteenth Amendment and that the deductions to be made from gross income in order to arrive at net income depend upon statutory interpretation and not upon constitutional construction. Though it seems likely that the Supreme Court would in most cases hold that return of the cost of acquiring property is not even part of the gross income from its sale within the meaning of income in the Sixteenth Amendment,¹³ we have as yet no hint that a constitutional issue would be raised by the refusal of Congress to allow deduction of expenses that taxpayers had incurred in getting gain from services or from sales of commodities. It seems

¹⁰ See cases cited *supra* note 3.

¹¹ " 'Income may be defined as the gain derived from capital, from labor, or from both combined.' . . .

"Understanding the term in this natural and obvious sense, it cannot be said that a conversion of capital assets invariably produces income. If sold at less than cost, it produces rather loss or outgo. Nevertheless, in many if not in most cases there results a gain that properly may be accounted as a part of the 'gross income' received 'from all sources'; and by applying to this the authorized deductions we arrive at 'net income.' In order to determine whether there has been gain or loss, and the amount of the gain, if any, we must withdraw from the gross proceeds an amount sufficient to restore the capital value that existed at the commencement of the period under consideration." *Doyle v. Mitchell Brothers Co.* (1918) 247 U. S. 179, 185, 38 Sup. Ct. 467, 469.

¹² *Stanton v. Baltic Mining Co.* (1916) 240 U. S. 103, 36 Sup. Ct. 278.

¹³ Support for this anticipation is found in the fact that in *Goodrich v. Edwards* (1921) 255 U. S. 527, 41 Sup. Ct. 390, the Supreme Court refused to hold that Congress intended to tax gain on the sale of property to the extent that the price received was in excess of the value on March 1, 1913, where that value was less than the original purchase price, though the language of Congress evidenced the

likely that in construing the Sixteenth Amendment the Supreme Court will recognize the category of gross income as in some respects distinct from that of gross receipts. The issues involved in this possibility are matters of more than nomenclature. Unless what is assessed is income within some possible meaning of the term, the tax must depend for its validity on considerations *dehors* the Sixteenth Amendment. State taxes stand on a different footing. Their validity under the commerce clause is judged by their effect on interstate commerce and their names do not much matter. Not that the Supreme Court does not resort to indulgence in nomenclature to explain or justify its decisions. It by no means eschews the aid of such servants, but it keeps nomenclature in its place as servant and forbids it to assume the rôle of master.¹⁴ Whether state taxes on gross receipts are properly called income taxes in whole or in part is a matter we may leave to the categorically minded. The Supreme Court appears to have thought of them as income taxes¹⁵ and for our present purposes it is convenient to

clearest intent to begin the reckoning on March 1, 1913, irrespective of any lower or higher value prior to that date, and the explicit provision making March 1, 1913, the "upset date" was unnecessary except to overlook higher value prior to that date, since without any such explicit provision the Supreme Court had held in *Lynch v. Turrish* (1918) 247 U. S. 221, 38 Sup. Ct. 537, that the reckoning should begin at March 1, 1913, when the value prior was lower than the value on that date.

¹⁴ See *Shaffer v. Carter* (1920) 252 U. S. 37, 55, 40 Sup. Ct. 221, 226, where Mr Justice Pitney in answer to a contention that an income tax is a personal tax and therefore cannot be imposed on a nonresident, observed:

"This argument, upon analysis, resolves itself into a mere question of definitions, and has no legitimate bearing upon any question raised under the Federal Constitution. For, where the question is whether a state taxing law contravenes rights secured by that instrument, the decision must depend not upon any mere question of form, construction, or definition, but upon the practical operation and effect of the tax imposed."

¹⁵ In *Philadelphia & Southern Mail Steamship Co. v. Pennsylvania* (1887) 122 U. S. 326, 344-345, 7 Sup. Ct. 1118, 1124, Mr. Justice Bradley said with reference to a gross-receipts tax:

"There is another point, however, which may properly deserve some attention. Can the tax in this case be regarded as an income tax? and, if it can, does that make any difference as to its constitutionality? We do not think that it can properly be regarded as an income tax. It is not a general tax on the incomes of all the inhabitants of the state; but a special tax on transportation companies. Conceding, however, that an income tax may be imposed on certain classes of the community, distinguished by the character of their occupations; this is not an income tax on the class to which it refers, but a tax on their receipts from transportation only. Many of the companies included in it may, and undoubtedly do, have incomes from other sources, such as rents of houses, wharves, stores, and water power, and interest on moneyed investments. As a tax on transportation, we have already seen from the quotations from the *State Freight Tax Case*, that it cannot be supported where that transportation is an ingredient of interstate or foreign commerce, even though the law imposing the tax be expressed in such general terms as to include receipts from transportation which are properly taxable. It is unnecessary, therefore, to discuss the question which would arise if the tax were properly a tax on income. It is clearly not such, but a tax on transportation only."

Here, it is to be noted, is no suggestion that the question whether the tax as an income tax is affected in any way by the distinction between gross receipts and net income. The characteristic of an income tax adverted to is some degree of generality.

treat them together with taxes on net income and so to put the two under one rubric. Any offence against classificatory taste pleads for pardon on the ground of possible service to other gods.

I. TAXES ON GROSS RECEIPTS

Taxes on gross receipts are of various kinds. They may be taxes directly on gross receipts or taxes on some act, occupation, or privilege, the amount of which is measured by gross receipts. Both kinds of taxes are, to the one who pays them, taxes on gross receipts. The Supreme Court, however, sometimes draws a distinction. Though the logic adduced in support of this distinction is extremely questionable and there are instances in which the Supreme Court refuses to apply it, the distinction is by no means completely discredited. As a practical matter it still must be reckoned with. Gross-receipts taxes also fall into separate groups depending upon the other taxes with which they are associated. This distinction tends to be confused with that between taxes directly on gross receipts and taxes measured by gross receipts, since the Supreme Court has chosen to say that a gross-receipts tax in lieu of a property tax is not a tax on gross receipts but a tax on property. Instead of declaring that the taxability of gross receipts depends upon the function of the particular tax in the whole fiscal system of a state, the judges prefer to put it that gross receipts from interstate commerce are not a taxable subject but that what seems to be a tax on gross receipts is a tax on something else if that something else is not otherwise taxed.

A. GROSS RECEIPTS FROM INTERSTATE TRANSPORTATION

(1) THE IDEA OF GROSS RECEIPTS AS A FUND IN POSSESSION

In 1873, when the Supreme Court was somewhat younger than it is at present, a tax on gross receipts from interstate transportation was sustained, in part on the notion that at the end of the period for which the tax was due the receipts had become disassociated from their origin and were a fund which had become the property of the company. This was in *State Tax on Railway Gross Receipts*¹⁶ in which the complaining

¹⁶ (1873, U. S.) 15 Wall. 284. At pages 294-295 Mr. Justice Strong declared:

"The tax is laid upon the gross receipts of the company; laid upon a fund which has become the property of the company, mingled with its other property, and possibly expended in improvements or put out at interest. The statute does not look beyond the corporation to those who may have contributed to its treasury. The tax is not levied, and, indeed, such a tax cannot be, until the expiration of each half-year, and until the money received for freights, and from other sources of income, has actually come into the company's hands. Then it has lost its distinctive character as freight earned, by having become incorporated into the general mass of the company's property. While it must be conceded that a tax upon interstate transportation is invalid, there seems to be no stronger reason for denying the power of a State to tax the fruits of such transportation after they have become intermingled with the general property of the carrier, than there is for denying her power to tax goods which have been imported, after their original packages have been broken, and after they have been mixed with the mass of personal property in the country. That such a tax is not unwarranted is plain."

railroad was a domestic corporation. For all that appears this remained law for fourteen years. Then in *Fargo v. Michigan*¹⁷ the Supreme Court refused to apply it to a foreign corporation, giving as one of its reasons that in all probability the receipts of a foreign corporation never entered the taxing state.¹⁸ Shortly after, in *Philadelphia & Southern Mail Steamship Co. v. Pennsylvania*¹⁹ the idea that gross receipts could be regarded as a fund in possession was abandoned altogether.²⁰ Since

In dissenting, Mr. Justice Miller declared that it seemed to him that to forbid the tax on transportation but to permit the tax on the gross receipts arising therefrom is "to keep the word of promise to the ear and break it to the hope."

¹⁷ (1887) 121 U. S. 230, 7 Sup. Ct. 857.

¹⁸ The opinion was written by Mr. Justice Miller who had dissented in the *Gross Receipts* case. Of the difference between the two he said:

"The distinction between that case, which is mainly relied upon by the Supreme Court of Michigan in support of its decree, and the one which we now have before us, is very obvious, and is twofold: First. The corporation which was the subject of that taxation was a Pennsylvania corporation, having the *situs* of its business within the state which created it and endowed it with its franchises. Upon these franchises thus conferred by the state, it was asserted, the state had a right to levy a tax. Second. This tax was levied upon money in the treasury of the corporation, upon property within the limits of the state, which had passed beyond the stage of compensation for freight and had become like any other property or money liable to taxation by the state. The case before us has neither of these qualities. The corporation upon which the tax is levied is not a corporation of the state of Michigan, and has never been organized or acknowledged as a corporation of that state. The money which it received for freight carried within the state probably never was within the state, being paid to the company either at the beginning or the end of its route, and certainly at the time the tax was levied it was neither money nor property of the corporation within the state of Michigan." 121 U. S. at p. 243, 7 Sup. Ct. at p. 862.

¹⁹ *Supra* note 15.

²⁰ Mr. Justice Bradley after saying politely that Mr. Justice Strong's assimilation of the gross-receipts tax to the tax on imported goods after the breaking of the original package (see *supra* note 16.) "seems to have much force" went on to show why it was foolish. He pointed out that imported goods could not be selected for a special tax, and continued:

"The tax in the present case is laid upon the gross receipts for transportation as such. Those receipts are followed and caused to be accounted for by the company, dollar for dollar. It is those specific receipts, or the amount thereof, (which is the same thing) for which the company is called upon to pay the tax. They are taxed not only because they are money, or its value, but because they were received for transportation. No doubt a ship-owner, like any other citizen, may be personally taxed for the amount of his property or estate, without regard to the source from which it was derived, whether from commerce, or banking, or any other employment. But that is an entirely different thing from laying a special tax upon his receipts in a particular employment. If such a tax is laid, and the receipts taxed are those derived from transporting goods and passengers in the way of interstate or foreign commerce, no matter when the tax is exacted, whether at the time of realizing the receipts, or at the end of every six months or a year, it is an exaction aimed at the commerce itself, and is a burden upon it, and seriously affects it. A review of the question convinces us that the first ground on which the decision in *State Tax on Railway Gross Receipts* was placed is not tenable; that it is not supported by anything decided in *Brown v. Maryland*; but, on the contrary, that the reasoning of that case is decidedly against it." 122 U. S. at pp. 341-342, 7 Sup. Ct. at pp. 1122-1123.

The idea here seems to be mainly that the selection of receipts from transportation for a special tax, not imposed on receipts from business generally, makes the origin of the receipts the basis of their taxability and therefore precludes the theory that the receipts had become disassociated from their origin. There

then, whenever gross receipts from interstate transportation have been held taxable by a state, there has always been some metamorphosis by which the tax was seen to be one, not on gross receipts, but on something else not in itself immune from state taxation.

(2) THE FIRST PHASE OF THE PRIVILEGE DOCTRINE: GROSS RECEIPTS
AS A MEASURE OF THE VALUE OR THE ENJOYMENT OF THE
PRIVILEGE OF CORPORATE EXISTENCE

The earliest of these transformations made the tax one in reality on the franchise which granted corporate existence to the carrier in question. This was one of the grounds of decision in *State Tax on Railway Gross Receipts*,²¹ a ground not available in the later case of *Fargo v.*

is also a flavor of the idea that interstate commerce is discriminated against by subjection to a tax which, though imposed on intrastate transportation, is not imposed on intrastate commerce generally.

Of course the basic absurdity of Mr. Justice Strong's opinion in the *Gross Receipts* case was in assuming that gross receipts are in any sense a fund in possession. They are nothing but a book-keeping item, the greater part of them being paid out soon after they are paid in and certainly before the end of the accounting period designated by the statute. Mr. Justice Bradley had concurred in the *Gross Receipts* case, but he shows the superiority of second thoughts when he says in the *Southern Mail* case:

"If, then, the commerce carried on by the plaintiff in error in this case could not be constitutionally taxed by the state, could the fares and freights received for transportation in carrying on that commerce be constitutionally taxed? If the state cannot tax the transportation, may it, nevertheless, tax the fares and freights received therefor? Where is the difference? Looking at the substance of things, and not at mere forms, it is very difficult to see any difference. The one thing seems to be tantamount to the other. It would seem to be rather metaphysics than plain logic for the state officials to say to the company: 'We will not tax you for the transportation you perform, but we will tax you for what you get by performing it.' Such a position can hardly be said to be based on a sound method of reasoning." 122 U. S. at pp. 336-337, 7 Sup. Ct. at p. 1120.

The soundness of this is apparent. Turn it about and it is clear that when under appropriate circumstances gross receipts from interstate commerce are held subject to state taxation the court is allowing interstate commerce to be taxed.

²¹ *Supra* note 16. Mr. Justice Strong says on this point:

"There is another view of this case to which brief reference may be made. It is not to be questioned that the States may tax the franchises of companies created by them, and that the tax may be proportioned either to the value of a franchise granted, or to the extent of its exercise; nor is it deniable that gross receipts may be a measure of proximate value, or, if not, at least of the extent of enjoyment. If the tax be, in fact, laid upon the companies, adopting such a measure imposes no greater burden upon any freight or business from which the receipts come than would an equal tax laid upon a direct valuation of the franchise. In both cases, the necessity of higher charges to meet the exaction is the same." (at p. 296.)

The minority opinion did not discuss this ground of the decision. Mr. Justice Strong goes beyond the idea of a property tax when he speaks of taxing the franchise to the extent of its enjoyment, since taxes on property must be assessed according to value. It is natural to infer that he had in the back of his mind the idea of a personal tax on the artificial person created by the state, an excise for enjoying the privilege granted. At the same term of court in

Michigan²² where the corporation was not the creature of Michigan. In the *Southern Mail* case,²³ decided at the same term as the *Fargo* case, the court declined to apply the principle of the *Gross Receipts* case to a domestic corporation where the tax was not confined to domestic corporations. Mr. Justice Bradley declared that the tax would be bad as one on the franchise to do business when the business done is interstate commerce.²⁴ Whether a state could now secure approval of a gross-

The Delaware Railroad Tax (1873, U. S.) 18 Wall. 206, 231, Mr. Justice Field, in refusing to inquire whether a tax on a domestic corporation based on the value of shares of capital stock assumed to represent property within the state was in effect on property without the jurisdiction, called the tax one on the corporation itself and declared:

"The State may impose taxes upon the corporation as an entity existing under its laws, as well as upon the capital stock of the corporation or its separate corporate property. And the manner in which its value shall be assessed and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion. It is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the legislature of the State; our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction."

This idea of an absolute power over the taxation of domestic corporations as home-made entities is now abandoned so far as the taxation of values of extra-state tangibles is concerned. *Delaware, L. & W. Ry. v. Pennsylvania* (1905) 198 U. S. 341, 25 Sup. Ct. 669; *Union Refrigerator Transit Co. v. Kentucky* (1905) 199 U. S. 194, 26 Sup. Ct. 36. It is not certain that the idea of an absolute power over taxing domestic corporations as entities was ever held as against objections under the commerce clause, except where the demand is a condition on the original grant of the charter. Mr. Justice Strong in the *Gross Receipts* case seems to rate the power somewhere above the ordinary power to tax property but to refrain from calling it an absolute power.

²²*Supra* note 17. See the passage from the opinion quoted *supra* note 18. Mr. Justice Miller goes further and denies any special power over domestic corporations when he says:

"The proposition that the states can, by way of a tax upon business transacted within their limits, or upon the franchises of corporations which they have chartered, regulate such business or the affairs of such corporations, has often been set up as a defence to the allegation that the taxation was such an interference with commerce as violated the constitutional provision now under consideration. But where the business so taxed is commerce itself, and is commerce among the states or with foreign nations, the constitutional provision cannot thereby be evaded; nor can the states, by granting franchises to corporations engaged in the business of the transportation of persons or merchandise among them, which is itself interstate commerce, acquire the right to regulate that commerce, either by taxation or in any other way." 121 U. S. at pp. 243-244, 7 Sup. Ct. at p. 863.

This, it is to be noted, is the dictum of the Justice who wrote the dissenting opinion in the *Gross Receipts* case and is not safely to be taken as more than an echo of that dissent which his colleagues did not bother to smother so long as it was not pertinent to the issue before them.

²³ (1887) 122 U. S. 326, 7 Sup. Ct. 1118.

²⁴ On these two points Mr. Justice Bradley says:

"The second ground on which the decision referred to [the *Gross Receipts* case] was based was, that the tax was upon the franchise of the corporation granted to it by the state. We do not think that this can be affirmed in the present case. It certainly could not have been intended as a tax on the corporate franchise, because, by the terms of the act, it was laid equally on the corporations of other states doing business in Pennsylvania. If intended as a tax on

receipts tax merely because the tax is declared to be one on the franchise to exist as a domestic corporation is open to considerable doubt. It is quite likely that such ground of support would now be subsumed under the doctrine that a tax on the franchise as property may be measured by the gross receipts as a method of valuing the franchise.²⁵ Such was in part the idea of Mr. Justice Bradley in the *Gross Receipts* case, but he went further and suggested the propriety of taxing the franchise to the extent of its exercise as distinct from the extent of its value.²⁶ Gross receipts may be an excellent index of the extent of the exercise of a franchise, but a very poor index of its value. No case since the eighties has required the Supreme Court to consider whether the *Gross Receipts* case is still law on the point that a gross-receipts tax may be imposed on a domestic corporation as a fair exaction for the extent of its enjoyment of corporate existence. The case on that point is not explicitly overruled.²⁷ Yet all gross-receipts taxes sustained in recent years have evoked the judicial comment that they imposed no more than relatively fair burdens on the property of the company, including its franchises as part of its property. Where the presence of certain elements in a situation is emphasized as a virtue, we are not unlikely to find their absence later condemned as a vice. By such illogic, courts not infrequently treat ancient cases as in effect overruled by successors that professed to distinguish them. So it may well be with the technically intact remnant of the *Gross Receipts* case if for reasons of substance the court now regards that remnant as no longer worth preserving. Discussion of this is deferred until completion of the review of the later life of the privilege doctrine.

(3) THE SECOND PHASE OF THE PRIVILEGE DOCTRINE: RECURRING
LEVY ON GROSS RECEIPTS AS A PRICE OR BONUS EXACTED AS A
CONDITION OF INCORPORATION

The next special ground on which a gross-receipts tax was sustained resembles that of the *Gross Receipts* case but is more restricted. In *Baltimore & Ohio Ry. v. Maryland*²⁸ the Supreme Court sustained a demand for compliance with a provision in the charter of a domestic

the franchise of doing business,—which in this case is the business of transportation in carrying on interstate and foreign commerce,—it would clearly be unconstitutional.” 122 U. S. at p. 342, 7 Sup. Ct. at p. 1123.

The domestic corporation involved in the case conducted no intrastate business in Pennsylvania, so that there was no subject on which a business tax could be laid and Mr. Justice Bradley's declaration has no reference to situations later considered in which a tax on a proper subject is measured in part by gross receipts from interstate commerce.

²⁵ See cases cited *supra* note 4.

²⁶ See quotation *supra* note 21.

²⁷ For argument that there is no such explicit overruling in *Galveston, H. & S. A. Ry. v. Texas* (1908) 210 U. S. 217, 28 Sup. Ct. 638, see pages 813-816 *infra*.

²⁸ (1874, U. S.) 21 Wall. 456.

corporation requiring the semi-annual payment of one-fifth of the gross receipts from transporting passengers between Baltimore and Washington. One ground of the decision is that the corporation came into existence with this string tied to its neck and that the string forever remains part of its inheritance which it cannot shake off.²⁹ There is the further justification that this annual recurring demand is not strictly a tax but rather a succession of deferred payments for the privilege of being born³⁰—a privilege which in spite of archbishops the state is entirely free to withhold and for which, therefore, it may charge as it pleases. To the majority the logic of the decision seemed ineluctable, but Mr. Justice Miller dissented because he found the practical result in square opposition to *Crandall v. Nevada*.³¹ The issue was really not

²⁹ At pages 469-472 of the opinion Mr. Justice Bradley says:

"In approaching the merits of the case it is unnecessary to examine in detail the various laws which constitute the charter of the railroad company in reference to the construction of the Washington branch. They were all accepted by the company, and no question of impairing the obligation of contracts is raised. . . .

"This unlimited right of the State to charge, or to authorize others to charge, toll, freight, or fare for transportation on its roads, canals, and railroads, arises from the simple fact that they are its own works, or constructed under its authority. It gives them being. It has a right to exact compensation for their use. That discretion is a legislative—a sovereign—discretion, and in its very nature is unrestricted and uncontrolled. . . . If the State, as a consideration of the franchise, had stipulated that it should have all the passenger-money, and that the corporation should have only the freight for the transportation of merchandise, and the corporation had agreed to those terms, it would have been the same thing. It is simply the exercise by the State of absolute control over its own property and prerogatives."

The point is perhaps put more clearly in two later decisions sustaining excises measured by total capital stock imposed under a law in force when the corporate charter was obtained. In *Ashley v. Ryan* (1894) 153 U. S. 436, 443, 14 Sup. Ct. 865, 867, Mr. Justice White says:

"It follows from these principles that a State, in granting a corporate privilege to its own citizens, or, what is equivalent thereto, in permitting a foreign corporation to become one of the constituent elements of a consolidated corporation organized under its laws, may impose such conditions as it deems proper, and that the acceptance of the franchise in either case implies a submission to the conditions without which the franchise could not have been obtained."

In support of this the *Maryland* case is cited and reviewed. The *Ashley* case is cited in *Kansas City, M. & B. Ry. v. Stiles* (1916) 242 U. S. 111, 117, 37 Sup. Ct. 58, 60, where Mr. Justice Day says:

"The railroads comprising this consolidation entered upon it with the Alabama statute before them and under its conditions, and, subject to constitutional objections as to its enforcement, they cannot be heard to complain of the terms under which they voluntarily invoked and received the grant of corporate existence from the state of Alabama."

³⁰ "The exercise of power on the part of a State is very different from the imposition of a tax or duty upon the movements or operations of commerce between the States. . . . So, the State has an undoubted power to exact a bonus for the grant of a franchise, payable in advance or *in futuro*; and yet that bonus will necessarily affect the charge upon the public which the donee of the franchise will be obliged to impose. The stipulated payment in this case, indeed, is nothing more nor less than a bonus; and so long as the rates of transportation are entirely discretionary with the States, such a stipulation is clearly within their reserved powers." (1874, U. S.) 21 Wall. 456, 472-473.

³¹ (1868, U. S.) 6 Wall. 35. This case held invalid a tax of one dollar upon each person leaving the state by any railroad or stage coach, on the ground that

one of logical deduction from an exclusive and unquestioned premise, but one of competing preferences for differing minor premises. The majority and the minority agreed that a state may tax the privilege of being incorporated and that it may not tax interstate commerce. The tax was both one on the privilege of corporate existence and one on gross receipts. As the former it was good; as the latter it was bad. It could not be both good and bad. The majority and the minority selected different aspects as the one to regard as predominant, and neither told why its choice was preferable to that of the other.

Similar choices have arisen since, and the Supreme Court has leaned now one way, and now the other. Yet thus far, when the issue has arisen as to the continuing validity of a recurrent demand initially imposed as a condition of incorporation, the decision has been in favor of the demand. None of the later cases has involved a gross-receipts tax, but the most recent decision has sanctioned a demand by no means devoid of the possibilities of evil lurking in a gross-receipts tax. This is *Kansas City, M. & B. Ry. v. Stiles*³² which refused to release a domestic corporation from a charter provision requiring a recurring annual excise measured by total capital stock. Such a tax had already been held obnoxious to the commerce clause and to the Fourteenth Amendment when imposed on foreign corporations previously admitted to the state.³³ Yet in the *Stiles* case it was asserted by the court that nothing in the character or amount of the tax makes it a burden on interstate commerce. Thus the door was left open for condemnation of more grievous burdens imposed as a price of incorporation. The decisions to date leave us much in the dark as to the present potency of the privilege doctrine when applied to charter stipulations. Efforts to see into the future should therefore be postponed until we have the benefit of the light that may be shed obliquely by cases involving other sorts of charter stipulations from which corporations have sought to escape.

(4) THE THIRD PHASE OF THE PRIVILEGE DOCTRINE: EXTENSION TO GROSS-RECEIPTS TAX ON FOREIGN CORPORATIONS

Still a third application of the theory of unrestrained power to tax a privilege lived for a while and then was laid to rest. In *Maine v. Grand*

the tax interfered with the right of citizens of the United States to pass freely from one state to another. The decision was not at the time based on the commerce clause, but it has since been regarded as a precedent for the interpretation of that clause.

³² See the quotation from this case *supra* note 29.

³³ *Western Union Tel. Co. v. Kansas* (1910) 216 U. S. 1, 30 Sup. Ct. 190; *Pullman Co. v. Kansas* (1910) 216 U. S. 56, 30 Sup. Ct. 232; *Ludwig v. Western Union Tel. Co.* (1910) 216 U. S. 146, 30 Sup. Ct. 280; *Atchison, T. & S. F. Ry. v. O'Connor* (1912) 223 U. S. 280, 32 Sup. Ct. 216. For decisions to the same effect subsequent to the *Stiles* case, *supra* note 29, see *Looney v. Crane Co.* (1917) 245 U. S. 178, 38 Sup. Ct. 85; *Locomobile Co. v. Massachusetts* (1918) 246 U. S.

*Trunk Ry.*³⁴ a gross-receipts tax levied as an excise on the privilege of exercising a franchise within the state was successfully imposed on a foreign corporation which prior to the tax law in question had with the consent of the Maine Legislature leased the rights and privileges of a Maine corporation. Mr. Justice Field in his prefatory narrative observes that, as the granting of the privilege of exercising a corporate franchise "rests entirely in the discretion of the state, whether the corporation be of domestic or of foreign origin, it may be conferred upon such conditions, pecuniary or otherwise, as the state may deem most conducive to its interests or policy."³⁵ This is the doctrine of the *Maryland* case³⁶ extended to foreign corporations. But such doctrine could not determine the case at bar, since the Maine demand was not made a condition of the privilege at the time of the grant. This difference is not noted by Mr. Justice Field. He tacitly assumes that a state may later require what it might originally have made a condition of its grant. This doubtless is predicated on the assumption that one or more of the privileges enjoyed by the Grand Trunk were revocable, so that permission to continue to exercise the privilege is equivalent to a new grant. This assumption as to the precarious character of the privilege of foreign corporations to do local business was in good and regular standing at this time and has not as yet been explicitly repudiated. As we shall see later, however, the corollary that a tax on such a previously conferred privilege may be assessed in any way that the state chooses is now discredited, and the major premise is itself open to serious question when the local business is an economically essential concomitant of the interstate business. Moreover the *Grand Trunk* case has since been hung on a wholly different peg from the two which Mr. Justice Field found for it. The first of these pegs was that the commerce clause no more restricts taxes on the privilege of doing local business as a foreign corporation than it restricts taxes on the privilege of existing as a domestic corporation. This is the technically surviving theory of the *Gross Receipts* case extended to foreign corporations. Mr. Justice Field, however, does not refer to the *Gross Receipts* case but relies on another precedent which not only illustrates the same privilege doctrine as that applied in the *Gross Receipts* case but also goes further and gives us an independent and even broader justification for gross-receipts taxes.

(5) THE PROPER-SUBJECT DOCTRINE: GROSS-RECEIPTS AS MERELY THE MEASURE OF A TAX AND NOT THE SUBJECT TAXED

The precedent which Mr. Justice Field adduced in support of the

146, 38 Sup. Ct. 298; *International Paper Co. v. Massachusetts* (1918) 246 U. S. 135, 38 Sup. Ct. 292.

³⁴ (1891) 142 U. S. 217, 12 Sup. Ct. 121.

³⁵ 142 U. S. at p. 228, 12 Sup. Ct. at p. 122.

³⁶ *Supra* note 28.

Grand Trunk case is *Home Insurance Co. v. New York*³⁷ which held that a tax on the franchise of a domestic corporation may be measured as the state sees fit and that it is immaterial that the measure adopted includes capital invested in United States bonds not themselves subject to state taxation. As in that case it was declared that the bonds themselves were not taxed, so in the *Grand Trunk* case it is asserted that "there is no levy by the statute on the receipts themselves, either in form or in fact; they constitute, as said above, simply the means of ascertaining the value of the privilege conferred."³⁸ Thus the *Grand Trunk* case gives us still a fifth theory on which to tax receipts from interstate commerce. It distinguishes the subject of the tax from the measure by which its amount is determined, and overlooks the measure so long as the subject is not immune from state power. This is a doctrine of wider scope than the theory of arbitrary power over a privilege that might have been denied or that may be withdrawn. The subjects on which taxes constitutionally may be laid by a state are not confined to privileges in the sense of some enterprise that might be forbidden. They include what, though often referred to as a privilege, is a privilege only in the narrower and quite different sense that it is a subject which cannot claim complete immunity from state taxation.

Such was the so-called privilege involved in *Ficklen v. Shelby County Taxing District*³⁹ in which brokers who secured a license to solicit intra-state sales were made to pay a percentage of their commissions from all sales. In reaching this result Chief Justice Fuller leaned heavily on the *Grand Trunk* case. His opinion is far from lucid or explicit, but from it may be extracted this line of reasoning. Mr. Ficklen was taxable because he held himself out to engage in local business. It was for this that he was taxed, and not for doing interstate business.⁴⁰ It was mere chance that his business during the year was all for extra-state vendors.⁴¹ If the Grand Trunk Railway, a foreign corporation, could not complain because the tax on its enterprise was measured by gross receipts from interstate commerce, a citizen doing business at his domicile cannot complain because the tax on his business is measured by his profits.⁴² This must mean that gross receipts from

³⁷ (1889) 134 U. S. 594, 10 Sup. Ct. 593.

³⁸ 142 U. S. 217, 229, 12 Sup. Ct. 121, 122.

³⁹ (1892) 145 U. S. 1, 12 Sup. Ct. 810.

⁴⁰ "But here the tax was not laid on the occupation or business of carrying on interstate commerce, or exacted as a condition of doing any particular commission business; and complainants voluntarily subjected themselves thereto in order to do a general business." 145 U. S. at p. 22, 12 Sup. Ct. at p. 812.

⁴¹ "No doubt can be entertained of the right of a state legislature to tax trades, professions and occupations, in the absence of inhibition in the state constitution in that regard; and where a resident citizen engages in a general business subject to a particular tax the fact that the business done chances to consist, for the time being, wholly or partially in negotiating sales between resident and non-resident merchants of goods situated in another State does not necessarily involve the taxation of interstate commerce, forbidden by the Constitution." 145 U. S. at p. 21, 12 Sup. Ct. at p. 812.

⁴² "Since a railroad company engaged in interstate commerce is liable to pay an excise tax according to the value of the business done in the State, ascertained

interstate commerce are as proper to include in the measure of a tax on doing local business as in the measure of a tax on the enjoyment of the privilege of doing business as a corporation. In neither case are the receipts themselves the subject of the tax. Any effect on interstate commerce is declared to be remote and incidental.

This distinction between the subject and the measure of the tax opens the door to verbal legerdemain, and it is not surprising that it has occasioned sharp disputes. The distinction is not wholly dead, but it is no longer true that the court will necessarily disregard the measure by which a tax is assessed. A vicious measure sometimes invalidates a tax on a proper subject. Though the prophylactic power of picking a proper subject is still recognized here and there, its potency against objections under the commerce clause is reduced nearly to the vanishing point. The later cases in which the issue was fully fought out⁴³ have not involved taxes measured by gross receipts, but it is unlikely that gross-receipts taxes could escape from their toils. Such taxes have the same potentialities of evil as the other taxes that have been prohibited and they have lost the assurance of justification because the tax is levied on something else than on the gross receipts themselves. This justification is now insufficient even when the so-called subject is a privilege that might have been withheld. As we have seen, the proper-subject doctrine is broader than the privilege doctrine but probably less potent. Clearly a privilege is subject to more drastic regulation than are enterprises that could not be suppressed. If, therefore, we find the foundations of the privilege doctrine shaken by later decisions, we may be sure that those of the proper-subject doctrine are undermined also. The former would die the harder death of the two. Its later history may therefore be taken as in part the story of the struggle between the commerce clause and the proper-subject doctrine as well.

(6) LATER HISTORY OF THE PRIVILEGE AND PROPER-SUBJECT DOCTRINES

Our review thus far has taken us up to the year 1892. Not until 1908 did the Supreme Court get a case which called for a reconsideration of its earlier attitude. Then in *Galveston, H. & S. A. Ry. v. Texas*⁴⁴ it relieved interstate receipts from the grasp of a statute imposing on each railroad whose lines lay wholly in the state an annual tax "equal to 1 per cent of its gross receipts." A minority of four called the demand

as above stated, it is difficult to see why a citizen doing a general business at the place of his domicile should escape payment of his share of the burdens of municipal government because the amount of his tax is arrived at by reference to his profits. This tax is not on the goods, or on the proceeds of the goods, nor is it a tax on non-resident merchants; and if it can be said to affect interstate commerce in any way it is incidentally, and so remotely as not to amount to a regulation of such commerce." 145 U. S. at p. 24, 12 Sup. Ct. at p. 813.

⁴³ For discussion of the avoidance of the issue in connection with the gross-receipts tax involved in *Galveston, H. & S. A. Ry. v. Texas*, *supra* note 1, see *infra* pages 813-816.

⁴⁴ *Supra* note 1.

an "occupation tax" and invoked the proper-subject doctrine to declare that the receipts from interstate commerce were not themselves taxed.⁴⁵ They also suggested the privilege doctrine in referring to the power of a state over its own corporations.⁴⁶ The majority apparently did not deem it necessary explicitly to reject either of these doctrines. Mr. Justice Holmes said that "of course, it does not matter that the plaintiffs in error are domestic corporations";⁴⁷ but this does not necessarily go any further than the declination in the *Southern Mail* case⁴⁸ to sustain a gross-receipts tax as one on the privilege of being a domestic corporation when the tax is not confined to domestic corporations.⁴⁹ Discussion of the proper-subject doctrine was avoided by saying that "this is merely an effort to reach the gross receipts, not even disguised by the name of an occupation tax, and in no way helped by the words 'equal to.'"⁵⁰ Technically the decision is confined to the ruling that the Texas tax before the court did not come within the class of taxes sustained in the *Gross Receipts* case, the *Grand Trunk* case and the *Ficklen* case; it falls short of an explicit abandonment of the doctrines of those cases or of any one of them. Prophecy, however, must not limit its diet to technicalities. One who in 1908 was interested less in what the court had done at the moment than in what it was going to do in the future had before him the clearest of signs that gross-receipts taxes could no longer rely on the proper-subject doctrine and that their hold on the privilege doctrine was very precarious.

The death sentence of the proper-subject doctrine is pronounced by the statement of Mr. Justice Holmes that "neither the state courts nor

⁴⁵ Mr. Justice Harlan says:

"Here there is no levying upon receipts as such from interstate commerce. The State only measures the occupation tax by looking at the entire amount of the business done within its limits without reference to the source from which the business comes. It does not tax any part of the business because of its being interstate. It has reference equally to all kinds of business done by the corporation in the State. Suppose the State as, under its constitution it might do, should impose an income tax upon railroad corporations of its own creation, doing business within the State, equal to a given per cent of all income received by the corporation from its business, would the corporation be entitled to have excluded from computation such of its income as was derived from interstate commerce? Such would be the right under the principles announced in the present case. In the case supposed the income tax would, under the principles or rules now announced, be regarded as a direct burden upon interstate commerce. I cannot assent to this view." 210 U. S. at pp. 229-230, 28 Sup. Ct. at p. 641.

Mr. Justice Harlan's apprehensions are, as we shall see later, unfounded with regard to a tax on net income and with regard to a tax on gross receipts that can be regarded as a fair substitute for a property tax.

⁴⁶ "The plaintiff in error is a Texas corporation, and it cannot be doubted that the State may impose an occupation tax on one of its own corporations, provided such tax does not interfere with the exercise of some power belonging to the United States." 210 U. S. at pp. 228-229, 28 Sup. Ct. at p. 641.

⁴⁷ 210 U. S. at p. 228, 28 Sup. Ct. at p. 641.

⁴⁸ *Supra* note 23.

⁴⁹ See quotation from the *Southern Mail* case, *supra* note 23.

⁵⁰ *Galveston, H. & S. A. Ry. v. Texas*, *supra* note 1, at p. 228, 28 Sup. Ct. at p. 641.

the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect."⁵¹ At most the doctrine could hope only for mercy on its soul from the added comment that if the tax "bears upon commerce among the states so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form."⁵² In these two sentences we have a clear enough rejection of the attitude of the minority that an occupation tax may be measured by gross receipts from interstate commerce. The poison administered to the privilege doctrine was more subtle. The *Grand Trunk* case was not overruled, but it was re-interpreted as an example of the cases which sustain gross-receipts taxes as taxes wholly or partially in lieu of a property tax, and as therefore, in substance, taxes on property and not taxes on gross receipts.⁵³ This sixth justification of a gross-receipts tax had been fully accredited from 1903 on.⁵⁴ The judges who sat in the *Grand Trunk* case in 1891 made no reference to it, but the Maine statute then before them admitted of the explanation and justification which Mr. Justice Holmes retroactively found for it in 1908. After this removal of the *Grand Trunk* case from the pedestal of absolute power to assess taxes on privileges as the state may choose, it seemed evident that all that remained on the pedestal of the privilege doctrine were, at the very most, taxes on domestic corporations and demands imposed initially as a condition of granting the privilege.

After these auguries, it is surprising to find the difference of opinion two years later in *Western Union Tel. Co. v. Kansas*⁵⁵ which rejected the privilege doctrine when adduced by the state to justify a tax on the local business of a foreign corporation which was measured by its total capital stock. The majority held the tax in substance one on property outside the state and thus unconstitutional as a regulation of interstate commerce and a taking of property without due process of law. Such a tax was concededly unconstitutional unless it could be justified by reason of the fact that the subject on which it was imposed was the

⁵¹ *Ibid.* 227, 28 Sup. Ct. at p. 640.

⁵² *Ibid.*

⁵³ Speaking of the *Grand Trunk* case, Mr. Justice Holmes said:

"This seems at first sight like a reaction from the *Philadelphia & Southern Mail Steamship Case*. But it may not have been. The estimated gross receipts per mile may be said to have been made a measure of the value of the property per mile. That the effort of the State was to reach that value, and not to fasten on the receipts from transportation as such, was shown by the fact that the scheme of the statute was to establish a system. The buildings of the railroad and its lands and fixtures outside of its right of way were to be taxed locally, as other property was taxed, and this excise with the local tax were to be in lieu of all taxes. The language shows that the local tax was not expected to include the additional value gained by the property being part of a going concern. That idea came in later. The excise was an attempt to reach that additional value. The two taxes together fairly may be called a commutation tax." 210 U. S. at p. 226, 28 Sup. Ct. at p. 640.

⁵⁴ *Wisconsin & M. Ry. v. Powers* (1903) 191 U. S. 379, 24 Sup. Ct. 107.

⁵⁵ *Supra* note 33.

privilege of a foreign corporation to do local business. The nub of the controversy was therefore the potency of the privilege doctrine. Justices Harlan and White who favored the privilege and the proper-subject doctrines in their dissent in the *Galveston* case now reject them in their concurrence in the *Western Union* case. On the other hand, Justices Peckham and Holmes who found no scope for these doctrines in their concurrence in the *Galveston* case now exalt them in their dissent in the *Western Union* case. Justices Brewer, Day, and Moody were consistent in being with the majority in both cases, as were Chief Justice Fuller and Mr. Justice McKenna in dissenting in both cases. One may explain those who excused the gross-receipts tax and condemned the tax on extra-territorial values on the ground that the latter may be thought much more vicious than the former. There is less to be said for Justices Peckham and Holmes. They may claim a formal consistency on the ground that the Texas statute in the *Galveston* case was not so worded as necessarily to invoke either the privilege or the proper-subject doctrines, while the Kansas statute in the *Western Union* case compelled a square facing of the issue. But in substance the dissent in the latter case closed its eyes to the statement of Mr. Justice Holmes in the *Galveston* case that "neither the state courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect."⁵⁶

We may now forget these curiosities since the *Western Union* case has been repeatedly approved by a unanimous court.⁵⁷ What still concerns us is whether the rejection of the privilege and proper-subject doctrines as a justification for the assessment of extra-territorial values necessarily means their rejection as a justification for a tax on gross-receipts from interstate commerce. Doubt assails us when we find that neither doctrine is completely annihilated. Taxes measured by total capital stock are still collectible from domestic corporations when the demand is a condition of incorporation.⁵⁸ They may be imposed on a foreign corporation if the statute sets a reasonable limit to the annual demand.⁵⁹ United States bonds in the capital of a domestic corporation

⁵⁶ *Supra* note 51.

⁵⁷ *Atchison, T. & S. F. Ry. v. O'Connor*, *Looney v. Crane Co.*, *Locomotive Co. v. Massachusetts*, and *International Paper Co. v. Massachusetts*, cited *supra* note 33.

⁵⁸ *Ashley v. Ryan and Kansas City, M. & B. Ry. v. Stiles*, cited *supra* note 29.

⁵⁹ *Baltic Mining Co. v. Massachusetts* (1913) 231 U. S. 68, 34 Sup. Ct. 15; *Lusk v. Botkin* (1916) 240 U. S. 236, 36 Sup. Ct. 263; *Cheney Brothers Co. v. Massachusetts* (1918) 246 U. S. 147, 38 Sup. Ct. 295; *General Railway Signal Co. v. Virginia* (1918) 246 U. S. 500, 38 Sup. Ct. 360. In the *Baltic Mining* case Mr. Justice Day said:

"The conclusion, therefore, that the authorized capital is only used as the measure of a tax, in itself lawful, without the necessary effect of burdening interstate commerce, brings the legislation within the authority of the State. So, if the tax is, as we hold it to be, levied upon a legitimate subject of such taxation, it is not void because imposed on property beyond the State's jurisdiction, for

may be included in the assessment of a tax on the franchise.⁶⁰ Income from sources not taxable by the United States may be included in the assessment of an excise on doing business in corporate form.⁶¹ Taxes on the transfer of property by inheritance may have their amount determined or affected by property not subject to taxation as such.⁶² All these are illustrations of the limited survival of one or both of the privilege and the proper-subject doctrines, and the latter is the basis of the cases sustaining gross-receipts taxes in lieu of property taxes.⁶³ With doctrines that the court accepts when it pleases and rejects when it pleases, one who would look at the future along lines of doctrine is likely soon to suffer from intellectual strabismus.

(7) THE BEARING OF THESE DOCTRINAL DEVELOPMENTS ON GROSS-RECEIPTS TAXES

If then the lights of doctrine compel us to look in different directions at the same time, by what beacons shall we steer our course? There is judicial psychology and there is the judgment of practical effects. The two perhaps may coincide. It seems clear that the Supreme Court is firmly convinced that taxes on gross receipts from interstate commerce have a deleterious effect on such commerce unless they are restricted in amount so as not to exceed the taxes that property and business generally must pay. The long line of cases in which gross receipts from

the property itself is not taxed. In so far as it is represented in the authorized capital stock, it is used only as a measure of taxation, and, as we have seen, such measure may be found in property or the receipts from property not in themselves taxable." 231 U. S. at p. 87, 34 Sup. Ct. at p. 19.

⁶⁰ *Society for Savings v. Coite* (1867, U. S.) 6 Wall. 594; *Provident Savings Institution v. Massachusetts* (1867, U. S.) 6 Wall. 611; *Hamilton Co. v. Massachusetts* (1867, U. S.) 6 Wall. 632; *Home Ins. Co. v. New York*, *supra* note 37.

⁶¹ *Flint v. Stone Tracy Co.* (1911) 220 U. S. 107, 31 Sup. Ct. 342. After referring to the *Galveston* case, *supra* note 1, and to the *Western Union* case, *supra* note 55, Mr. Justice Day says:

"There is nothing in these cases contrary, as we shall have occasion to see, to the former rulings of this court which hold that where a tax is lawfully imposed upon the exercise of privileges within the taxing power of the State or Nation, the measure of such tax may be the income from the property of the corporation, although a part of such income is derived from property in itself non-taxable. The distinction lies between the attempt to tax the property as such and to measure a legitimate tax upon the privileges involved in the use of such property." 220 U. S. at pp. 163-164, 31 Sup. Ct. at p. 354.

The *Stone Tracy* case also held that since what was taxed was doing business in corporate form the tax was indirect, the income of the corporation being only the measure and not the subject of the tax.

⁶² *United States v. Perkins* (1896) 163 U. S. 625, 16 Sup. Ct. 1073 (state tax on bequest to the federal government); *Plummer v. Coler* (1900) 178 U. S. 115, 20 Sup. Ct. 829 (state tax on legacy of United States bonds); *Snyder v. Bettman* (1903) 190 U. S. 249, 23 Sup. Ct. 803 (federal inheritance tax on legacy to municipal corporation); *Maxwell v. Bugbee* (1919) 250 U. S. 525, 40 Sup. Ct. 2 (rate of state inheritance tax on estate of non-resident decedent determined by amount of estate without and within the state).

⁶³ See cases cited *supra* note 4.

interstate commerce have been held immune from state taxation⁶⁴ is sufficient evidence of this. In the *Galveston* case four of the judges found it possible and proper to invoke the proper-subject doctrines, but the majority put it to one side. Though the concluding sentences of the opinion tread softly to avoid stamping on the doctrine, earlier sentences would have to be expunged from memory before the court could with a straight face condone a verbal amendment which inevitably brought the doctrine into play. So, too, in a recent case sustaining a tax on net income, the evil effects of taxes on gross receipts from interstate commerce were announced in no uncertain terms.⁶⁵ This utterance, it is to be noted, was in a case involving a tax on a domestic corporation. Thus the best evidence is that the surviving remnant of the *Gross Receipts* case would be explicitly repudiated as soon as the occasion arose. This means that previously granted franchises of domestic corporations cannot now be subjected to an excise measured by gross receipts from interstate commerce except as such a tax is thought of as a fair substitute for a property tax. *A fortiori* such a tax on foreign corporations would be similarly restricted and the *Grand Trunk* case left to survive only as reincarnated in the opinion in the *Galveston* case.

This guess is not impeached by the sporadic survivals of the privilege and proper-subject doctrines. Inheritance taxes are fortuitous and

⁶⁴ *Fargo v. Michigan*, *supra* note 17; *Philadelphia & Southern Mail S. S. Co. v. Pennsylvania*, *supra* note 15; *Ratterman v. Western Union Tel. Co.* (1888) 127 U. S. 411, 8 Sup. Ct. 1127; *Western Union Tel. Co. v. Alabama Board of Assessment* (1889) 132 U. S. 472, 10 Sup. Ct. 161; *Galveston, H. & S. A. Ry. v. Texas*, *supra* note 1; *Meyer v. Wells, Fargo & Co.* (1912) 223 U. S. 298, 32 Sup. Ct. 218; *Crew Levick Co. v. Pennsylvania* (1917) 245 U. S. 292, 38 Sup. Ct. 126. For cases declaring unconstitutional fees measured by the volume of interstate business done, see *Passenger Cases* (1849, U. S.) 7 How. 283; *Crandall v. Nevada* (1868, U. S.) 6 Wall. 35; *State Freight Tax* (1873, U. S.) 15 Wall. 232; *Henderson v. Mayor of New York* (1876) 92 U. S. 259, 270; *Chy Lung v. Freeman* (1876) 92 U. S. 275; *Western Union Tel. Co. v. Texas* (1881) 105 U. S. 460; *Western Union Tel. Co. v. Pennsylvania* (1888) 128 U. S. 39, 9 Sup. Ct. 6; *D. E. Foote & Co. v. Stanley* (1914) 232 U. S. 494, 34 Sup. Ct. 377; *Standard Oil Co. v. Graves* (1919) 249 U. S. 389, 39 Sup. Ct. 320; *Askren v. Continental Oil Co.* (1920) 252 U. S. 444, 40 Sup. Ct. 355; *Bowman v. Continental Oil Co.* (1921) 256 U. S. —, 41 Sup. Ct. 606; *Eureka Pipe Line Co. v. Hallanan* (1921) 257 U. S. —, 42 Sup. Ct. 101; *United Fuel Gas Co. v. Hallanan* (1921) 257 U. S. —, 42 Sup. Ct. 105.

⁶⁵ See Mr. Justice Pitney in *United States Glue Co. v. Oak Creek*, *supra* note 5: "The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. A tax upon net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large." 247 U. S. at pp. 328-329, 38 Sup. Ct. at p. 501.

occasional, and permission to fix their rates by property not taxable has no such effect on constitutionally protected interests as does a tax on interstate gross receipts. Inclusion of non-taxable state or federal bonds in state excises on franchises or federal excises on doing business in corporate form is justified by the fact that the exemption of such securities from direct taxation rests on an extremely questionable policy and it therefore is well to confine the exemption within narrow limits. So, too, the question whether a federal excise measured by income is a direct or indirect tax depends for its answer upon such disputable considerations that judicial acquiescence in a little verbal legerdemain to save the Corporation Excise of 1909 from the requirement of apportionment rests upon a judgment that affords no warrant for a similar tolerance toward taxes on gross receipts from interstate commerce. More difficult to brush to one side are the cases sustaining excises on foreign corporations measured by total capital stock up to a certain limit. This relapse into the privilege and proper-subject doctrines is hard to explain. It provoked dissent when first indulged in and probably was a little salve administered to the wound inflicted on the states by the bitterly contested *Western Union* case. It is an aberration from the general attitude toward taxation of extra-territorial values and is justified, if at all, only on the idea that a flat fee would be difficult to scotch and that the maximum limit makes the tax like a flat fee with a provision for reduction in the case of corporations of small or moderate size. At any rate this relapse is *sui generis* and affords no reason for thinking that it would be emulated to save a gross-receipts tax from the fangs of the commerce clause.

This brings us to the present health of the doctrine that the price exacted for the grant of a privilege must be paid so long as the privilege continues to be enjoyed even though the price is in and of itself something that could not be demanded except on the assumption that the demand has voluntarily been submitted to. This is a reasonable doctrine if confined to situations in which arbitrary power to withhold or to grant the privilege is well founded in wisdom as well as in law, and if the person or corporation jeopardizes no interests of others in buying the privilege at the price charged. I may well be allowed to hold my neighbor to his promise to return my watch when his promise was exacted as the price of lending it to him, but it does not follow that I may hold him to a promise to slander my enemy. It is one thing to sanction an exorbitant money price for a license to use a patented article; it is quite a different thing to sanction a promise to discriminate between individuals in the services rendered with the aid of the article⁶⁶ or a promise to refrain from using the products of another in conjunc-

⁶⁶ *Missouri v. Bell Tel. Co.* (1885, C. C. E. D. Mo.) 23 Fed. 539; *State v. Delaware & A. Tel. & Tel. Co.* (1891, C. C. D. Del.) 47 Fed. 633; *Delaware & A. Tel. & Tel. Co. v. State* (1892, C. C. A. 3d) 50 Fed. 677.

tion with the article.⁶⁷ The exaction of a price for a privilege may prejudice interests that would not be affected by the denial of the privilege. Mr. Justice Holmes neglected this difference when in his dissent in the *Western Union* case he said: "Even in the law the whole generally includes its parts. If the state may prohibit, it may prohibit with the privilege of avoiding the prohibition in a certain way."⁶⁸ He himself pointed out the difference when in a later dissent he conceded: "No doubt this principle might be limited or excluded in cases where the condition tends to bring about a state of things that there is a predominant public interest to prevent."⁶⁹ Plainly enough we have something more than the relation of whole and part when the part is part of another whole as well. Logic does not compel the conclusion that arbitrary power to withhold consent necessarily carries with it arbitrary power to exact any price for consent given. If the Supreme Court is now convinced that a tax on interstate gross receipts is a sufficiently serious burden on interstate commerce to amount to a regulation thereof in the constitutional sense, it has ample warrant in logic and in precedent for declaring that such a burden cannot be excused because the carrier has agreed to bear it as the price of some privilege which the state might have withheld.

The wiggling and wobbling of the Supreme Court on this so-called doctrine of "unconstitutional conditions" has been most admirably analyzed by Mr. Gerard Carl Henderson in his illuminating study of *The Position of Foreign Corporations in American Constitutional Law*.⁷⁰ Mr. Henderson inclines to the prophecy that the Supreme Court will in time come to the position that the state has no arbitrary and absolute power to exclude or expel a foreign corporation.⁷¹ Such an eventuality would mean that any gross-receipts tax on a foreign corporation must stand or fall on its own merits. The latest utterance

⁶⁷ *Motion Picture Patents Co. v. Universal Film Mfg. Co.* (1917) 243 U. S. 502, 37 Sup. Ct. 416, overruling *Henry v. A. B. Dick Co.* (1912) 244 U. S. 1, 32 Sup. Ct. 364.

⁶⁸ (1910) 216 U. S. 1, 53, 30 Sup. Ct. 190, 208.

⁶⁹ *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, *supra* note 67.

⁷⁰ *Harvard Studies in Jurisprudence*, Volume II (Harv. Univ. Press, 1918).

⁷¹ "When the argument has reached this stage, it becomes apparent that what the Supreme Court has really done is to abandon the traditional doctrine that a foreign corporation can be excluded at the will of the state. Until this is recognized, we are left in a maze of inconsistencies. To 'permit your property to be taken without due process' is a contradiction in terms. Property taken by permission is not taken without due process. It must then be that the state cannot exact the permission. But when a state is no longer allowed to get what price it can for the privilege of doing business within its borders, this means that the privilege is no longer within its control. . . ." (page 147.)

"It seems most likely, therefore, that the doctrine of unconstitutional conditions will in the future be absorbed by the larger principle that a foreign corporation is protected against arbitrary expulsion or discrimination by the Fourteenth Amendment, and that its only influence will be to ensure that the doctrine is applied not only to corporations already in the state when the objectionable law is passed, but to all that may subsequently enter." (page 162.)

of the Supreme Court does not encourage faith in Mr. Henderson's prophecy,⁷² but there still remains the prospect that exclusion or expulsion from local business may, if occasion demands, be held unconstitutional as a burden on related interstate business. Certainly interstate transportation would be seriously affected if the facilities for such transportation could not also be employed in local transportation. The economic integration of the two was emphasized in the *Western Union* case,⁷³ and only the perverse or stupid could deny it or neglect it. If upon a manifestation of this integration, the so-called privilege of a

⁷² In *Crescent Cotton Oil Co. v. Mississippi* (1921) 257 U. S. —, 42 Sup. Ct. 42, 44, Mr. Justice Clarke, in justifying a discrimination against corporations in favor of individuals in a statute prohibiting the former from owning or operating any cotton gin if they were also interested in the manufacture of cotton-seed oil or meal, adduced the old doctrine of arbitrary power as follows:

"Where, as we have found in this case, a foreign corporation has no federal right to continue to do business in a state, and where, as here, no contract right is involved, and there is no employment by the federal government, it is the settled law that a state may impose conditions, in its discretion, upon the right of such a corporation to do business within the state, even to the extent of excluding it altogether. *Horn Silver Min. Co. v. New York*, 143 U. S. 305, 12 Sup. Ct. 403; *Baltic Min. Co. v. Massachusetts*, 231 U. S. 68, 83, 34 Sup. Ct. 15, and cases cited. And in such case the inherent difference between corporations and natural persons is sufficient to sustain a classification making restrictions applicable to corporations only. *Hammond Packing Co. v. Arkansas*, 212 U. S. 322, 343, 344, 29 Sup. Ct. 370; *Baltic Min. Co. v. Massachusetts*, 231 U. S. 68, 83, 34 Sup. Ct. 15."

This approving citation of the *Horn Silver Mining* case tends to shake one's confidence that this case would be overruled as soon as the issue arose, and that the rule of the *Western Union* case would be applied to foreign corporations engaged exclusively in local commerce. Yet the doctrine of that case has been referred to in *La Belle Iron Works v. United States* (1921) 256 U. S. 377, 41 Sup. Ct. 528, as being based upon the Fourteenth Amendment, without any reference to the conjunction of the commerce clause, and as forbidding excises on foreign corporations which in substance tax extra-territorial values. Perhaps the best guess from these two recent opinions is that the privilege and proper-subject doctrines will be applied to foreign corporations to excuse exactions and regulations of a venial character, but will be rejected when invoked to justify something really reprehensible.

⁷³ Mr. Justice White in his concurring opinion said:

"The investment is there, and its magnitude, it is fair to assume, is, in part, a resultant of the requirements of the local business. The continued beneficial existence of the investment depends upon the right to use the property for the purpose for which it was acquired, that is, for both interstate and local business." 216 U. S. at p. 50, 30 Sup. Ct. at p. 207.

Mr. Justice Harlan in the opinion of the court declared:

"We cannot fail to recognize the intimate connection which, at this day, exists between the interstate business done by interstate companies and the local business which, for the convenience of the people, must be done or can generally be better and more economically done by such interstate companies rather than by domestic companies organized to conduct only local business." 216 U. S. at p. 37, 30 Sup. Ct. at p. 202.

Earlier he had observed that "the state knows that the Telegraph Company, in order to accommodate the general public and make its telegraph system effective, must do all kinds of telegraphic business." 216 U. S. at p. 33, 30 Sup. Ct. at p. 200.

foreign corporation to do local business ceases to be a privilege and becomes a right, then no basis remains for clubbing foreign corporations into any agreement to submit to a levy on gross receipts from interstate transportation. It is already settled that the power to expel is not strong enough to justify a tax measured by total capital stock⁷⁴ and there is every reason to believe that the power to exclude is equally impotent.⁷⁵ Gross-receipts taxes are equally unconstitutional unless justified in some way. If the justification of power over the foreign corporation fails for one tax that is held to violate the commerce clause, it is to be anticipated that it will also fail for other taxes intrinsically obnoxious to that clause.

The situation of the domestic corporation leaves one with more doubts. There is little reason to believe that the Supreme Court will ever hold that a state cannot refuse to allow a corporation to be born. Here is a privilege likely to remain a privilege. The question is whether the power to refuse it will continue to sanction a power to impose terms that, considered independently, violate the commerce clause. The recognition of such a sanction in 1875⁷⁶ is of little significance after all the water that has flowed under the bridge since then. What is really perplexing is the approval in 1916⁷⁷ of a tax measured by total capital stock imposed on a domestic corporation by a law in force at its birth. Does this mean that the state might have made its midwife's fee a recurring toll on interstate gross receipts? The privilege doctrine invoked by the court would invite an answer in the affirmative. But, as we have seen, the privilege doctrine is discarded at will. So we are back again at judicial psychology and economic effects. The opinion

⁷⁴ See cases cited *supra* note 33.

⁷⁵ In none of the cases subsequent to the *Western Union* case has it been emphasized that the foreign corporation was admitted to the state prior to the enactment of the objectionable tax law. In *General Railway Signal Co. v. Virginia*, *supra* note 59, in which an excise measured roughly by capital stock was sustained for the reasons that the statute set a maximum limit and that the tax did not ascend *pari passu* with each increment of capital stock but went up by a succession of jumps, the facts make it likely that the corporation entered the state after the tax law was in force; but this was not adverted to in support of the tax. Obviously the impediment to interstate commerce is as serious when a corporation is prevented from coming into a state to erect a signal system which has to be brought in from without the state as when a corporation already in the state is subjected to new taxes which make it unprofitable to inaugurate any new enterprise. If a state can impose barriers against foreign corporations desiring to enter the state to do some local acts which are practically indispensable to introducing appliances from without the state, local enterprisers will have an advantage which will favor local commerce at the expense of interstate commerce. The argument will apply almost universally to transportation and transmission companies which cannot enter for interstate commerce unless their facilities may also be used for local traffic.

⁷⁶ *Baltimore & Ohio Ry. v. Maryland*, *supra* note 28.

⁷⁷ *Kansas City, M. & B. Ry. v. Stiles*, *supra* note 32.

in the *Stiles* case⁷⁸ had enough to say about the absence of any burden on interstate commerce to incline one to the inference that the tax itself was thought not very bad. It was \$2,434.40 on a paid-up capital stock of \$5,976,000. The rate of the tax diminished as the capital stock increased up to \$5,000,000, and was only ten cents on each \$1,000 of capital over that amount. Thus the sum due each year was substantially fixed and uniform and did not vary with the volume of business done. True, it was arrived at in part by resort to extra-territorial values as was the Kansas tax declared invalid in the *Western Union* case. But there is a significant difference between sustaining such a tax on a domestic corporation and permitting it to be imposed on a foreign corporation. A corporation is usually domestic in only one state; it is foreign in many states. One tax on extra-territorial values may be forgivable where forty-seven taxes are not. The grounds of objection to the tax in the *Stiles* case were technical only, and not substantial. Doctrine aside, the forgiveness of such a tax sets no precedent for clemency toward a tax on interstate gross receipts. If the court really thinks a gross-receipts tax vicious, it can readily put the *Stiles* case to one side. Plainly such a tax varying with the volume of interstate commerce is more of a menace to such commerce than a tax fixed by total capital stock. "Each case," said the court in the *Stiles* case, "must depend upon its own circumstances,"⁷⁹ and the circumstances of a gross-receipts tax would have a substantially different complexion from those of the capital-stock tax.

It is clear enough that the privilege doctrine has no secure saving grace for police restrictions that unduly burden interstate commerce. Oklahoma invented an ingenious plan to keep natural gas from being piped out of the state. The privilege of constructing pipe lines was confined to domestic corporations and charters were conditioned on refraining from piping gas outside the state or delivering it to others bent on such pursuit. In *West v. Kansas Natural Gas Co.*⁸⁰ the plan was foiled by an injunction against enforcing the embargo. Mr. Justice McKenna went so far as to say that "no state can by action or inaction prevent, unreasonably burden, discriminate against or directly regulate interstate commerce or the right to carry it on."⁸¹ So too in *International & G. N. R. Co. v. Anderson County*⁸² the door was left open for the ruling that a charter condition that shops be maintained in the county where they were erected in conformity with a contract for county aid would cease to be binding if conditions made this location of the shops a serious burden on interstate commerce.⁸³ A few months

⁷⁸ *Ibid.*

⁷⁹ (1916) 242 U. S. 111, 118, 37 Sup. Ct. 58, 61.

⁸⁰ (1911) 221 U. S. 229, 31 Sup. Ct. 564.

⁸¹ *Ibid.* 262, 31 Sup. Ct. at p. 574.

⁸² (1918) 246 U. S. 424, 38 Sup. Ct. 370.

⁸³ The court found that the burden alleged did not in fact exist or was at any

ago charter restrictions as to maximum intra-state fares were held to be no obstacle to the enforcement of a statute of Congress authorizing the Interstate Commerce Commission to promulgate higher fares.⁸⁴ What perhaps is still more significant is the recent declaration that a privilege cannot be withdrawn for violation of conditions that cannot constitutionally be imposed.⁸⁵ Thus the current course of Supreme Court deci-

rate "indirect," but the discussion of the question was prefaced by saying: "The acceptance of the charter by the plaintiff in error disposes of every constitutional objection but one." 246 U. S. at p. 433, 38 Sup. Ct. at p. 373. This implies plainly that the objection that the requirement burdened interstate commerce was not disposed of by the fact that the company had agreed in its charter to bear it.

⁸⁴ *New York v. United States* (1922) 258 U. S. —, 42 Sup. Ct. 239. The justification for the federal action in raising intrastate rates was that unless these rates were raised there would be discrimination against interstate commerce since interstate rates would have to be maintained at a higher level in order to carry out the purpose of Congress "to provide the people of the United States with adequate transportation." No attention was paid to the possible objection that the state corporation was without charter power to charge more than two cents, the charter restriction being treated like any private contract or state legislation that must yield to an exercise by Congress of its commerce power. It does not follow from this case that charter restrictions would vanish in the absence of controlling congressional legislation, but the case in no way militates against the inference from the opinion in the *Anderson County* case quoted *supra* note 83. *New York v. United States* does not touch the question whether the state could forfeit the charter of the corporation for transcending the powers conferred by the state. On this question see *infra* note 85.

⁸⁵ *Terral v. Burke Construction Co.* (1922) 257 U. S. —, 42 Sup. Ct. 188. This case held that a state cannot expel a foreign corporation because it resorts to the federal courts, overruling *Security Mut. Life Ins. Co. v. Prewitt* (1906) 202 U. S. 246, 26 Sup. Ct. 619, or rather declaring that it had been overruled by intervening decisions. In the course of the opinion Chief Justice Taft said:

"The principle established by the more recent decisions of this court is that a state may not, in imposing conditions upon the privilege of a foreign corporation's doing business in the state, exact from it a waiver of the exercise of its constitutional right to resort to the federal courts, or thereafter withdraw the privilege of doing business because of its exercise of such right, whether waived in advance or not. The principle does not depend for its application on the character of the business the corporation does, whether state or interstate, although that has been suggested as a distinction in some cases. It rests on the ground that the federal Constitution confers upon citizens of one state the right to resort to federal courts in another; that state action, whether legislative or executive, necessarily calculated to curtail the free exercise of the right thus secured is void because the sovereign power of a state in excluding foreign corporations, as in the exercise of all others of its sovereign powers, is subject to the limitations of the supreme fundamental law."

This does not deny that the state is privileged to exclude foreign corporations not engaged in interstate commerce or in business for the federal government, but it says that exclusion or expulsion cannot be used as a club to compel a surrender of other constitutional rights. This is equally applicable to any other privilege which the state seeks to use as a club to affect other interests than those of the privilege seeker. It is a precedent for holding that a state cannot revoke the charter of a domestic corporation for failing to comply with a charter requirement to pay a tax which the court finds a substantial burden on interstate commerce, if that is a result which the court desires to reach.

sions leads inevitably to the conclusion that no serious burden on interstate commerce can be imposed by a state through the device of making assumption of the burden a condition of receiving a privilege that might be withheld. The privilege doctrine may still sell indulgences to technical peccadillos but it no longer licenses any substantial sin.

There always remains, however, the question whether a gross-receipts tax is in substance guilty of sin against the commerce clause. The fact that the imposition is a part of an agreement between the state and a corporation under which the latter acquires not only its existence but the power of eminent domain, the privilege of crossing highways, and the enjoyment of a factual, if not a legal, monopoly, is a circumstance that cannot be neglected in judging the substantial character of the recurring demand. Such valuable endowments must be paid for, as right of way and rolling stock must be paid for. The agreed-upon percentage of gross receipts is to a considerable extent a payment to the state in the nature of rents or royalties.⁸⁶ From the standpoint of the state they may be velvet, but those who have bargained to pay them are in a poor position to deny that they are a *quid pro quo*. This line of thought might well be accepted as completely controlling if it were not for the intrusion of other interests than those of the high contracting parties. Somewhere a point may be reached where these other interests must be allowed to call a halt. If police restrictions by way of charter limitations must succumb to the policy of freedom of interstate commerce found to be implicit in the commerce clause, so monetary demands imposed in charters must pass the tests set by that same policy. The line will be drawn in different places depending upon the situation in each particular case, but the condonation of many a charter demand would not close the door to complaints against more serious impediments to the flow of commerce among the several states. So varied are the practical issues that may arise, so diverse or antagonistic the interests that may compete for preference, that seldom if ever will salvation be found in the unbending application of any rigid formula or doctrine. If the steps of the Supreme Court are plotted with reference to lines of doctrine, that august body will always seem to stagger. Doctrine is but seldom its cloud by day or its pillar of fire by night. For the most part its compass is set by other stars. Charter restrictions may perhaps have their pound of flesh and not a little blood; but when the bleeding is too profuse, the wider interests in freedom of communication will find somewhere in the commerce clause an adequate astringent.

Even when a gross-receipts levy cannot be condoned as a stipulated price or bonus, it still may urge that it is a legitimate tax upon the property value inhering in the franchise or a fair contribution for the

⁸⁶ For cases sustaining state charges for facilities furnished see Hall, *Cases on Constitutional Law* (1913) 1101, note 2.

extent of the enjoyment thereof. Indeed, one may well doubt whether any case will appear in which charter stipulations depend for their validity upon the bonus or price idea alone. It is likely that whenever a charter levy on gross receipts is called in question it will always be found that there are elements of value in the corporate enterprise not assessed or taxed in any other way. Such was the situation disclosed in *State v. Illinois Cent. Ry.*⁸⁷ in which after the *Galveston* case and the *Western Union* case the Illinois Supreme Court sustained a gross-receipts tax on the combined grounds that it was an agreed-upon price for a privilege and a fair method of fixing an equivalent for a tax that would otherwise ordinarily be levied on the property of the company. The principle that a gross-receipts tax may be a substitute for a property tax and so sustained as in substance a tax on property is firmly established. This principle and the limitations on its application will be considered in the next instalment of this study. The cases in which these so-called "in lieu" taxes have been questioned in the Supreme Court are not numerous, but an examination of the tax laws of the several states reveals an almost bewildering variety of combinations in which gross-receipts taxes play a part and suggests several problems that the court may some time be called upon to consider.

(To be continued)

⁸⁷ (1910) 246 Ill. 188, 92 N. E. 814.